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HOUSE BILL 11

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Max Coll

AN ACT

RELATING TO EMPLOYMENT; ENACTING THE WHISTLEBLOWER PROTECTION ACT; PROHIBITING EMPLOYER RETALIATORY ACTION AGAINST EMPLOYEES IN CERTAIN CIRCUMSTANCES; PROVIDING FOR GRIEVANCE PROCEDURES AND PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the "Whistleblower Protection Act".

Section 2. PURPOSE.--It is the purpose of the Whistleblower Protection Act to encourage employees to notify the appropriate persons of illegal acts of public concern. This reporting is encouraged in order to protect the public and employees and to assist public bodies charged with ensuring adequate safety and health standards.

Section 3. DEFINITIONS.--As used in the Whistleblower

1 Protection Act:

2 A. "blacklisting" means informing others that a
3 person acted in a manner that is protected by the Whistleblower
4 Protection Act and intending to hinder that person's ability to
5 obtain employment;

6 B. "commission" means the human rights commission;

7 C. "director" means the director of the division;

8 D. "division" means the human rights division of
9 the labor department;

10 E. "employee" means a person who performs services
11 for and under the control and direction of an employer for
12 wages or other remuneration;

13 F. "employer" means a person who has four or more
14 employees and includes an agent of an employer and a public
15 employer;

16 G. "improper act" means a practice, procedure,
17 action or failure to act on the part of an employer that is of
18 public concern and violates a state or federal law, federal
19 regulation or state administrative rule;

20 H. "public body" means a state government
21 department, agency or political subdivision;

22 I. "retaliatory action" means blacklisting or the
23 discharge, suspension, demotion, disciplining or any
24 discriminatory or adverse employment action against an employee
25 in the terms and conditions of employment; and

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1 J. "secretary" means the secretary of labor.

2 Section 4. EMPLOYER RETALIATORY ACTION PROHIBITED. -- An
3 employer shall not take any retaliatory action against an
4 employee because the employee:

5 A. discloses, or threatens to disclose, to an
6 employer or to a private or public body an activity, policy or
7 practice of the employer that constitutes an improper act or
8 that the employee believes in good faith constitutes an
9 improper act;

10 B. provides information to, or testifies before, a
11 public body as part of an investigation, hearing or inquiry
12 into an improper act; or

13 C. objects to or refuses to participate in an
14 activity, policy or practice that constitutes an improper act.

15 Section 5. BLACKLISTING PROHIBITED. -- An employer shall
16 not blacklist a current or former employee.

17 Section 6. GRIEVANCE PROCEDURE. --

18 A. An employee claiming to be subject to a
19 retaliatory action prohibited by the Whistleblower Protection
20 Act may file with the division a written complaint that shall
21 state the name and address of the person alleged to have
22 engaged in the retaliatory action, all information relating to
23 the retaliatory action and any other information that may be
24 required by the commission. All complaints shall be filed with
25 the division within one hundred eighty days after the alleged

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1 retaliatory action was committed.

2 B. The director shall advise the respondent that a
3 complaint has been filed against him and shall furnish him with
4 a copy of the complaint. The director shall promptly
5 investigate the alleged retaliatory action. If the director
6 determines that the complaint lacks probable cause, the
7 director shall dismiss the complaint and notify the complainant
8 and respondent of the dismissal. The complaint shall be
9 dismissed subject to appeal as in the case of other orders of
10 the commission.

11 C. If the director determines that probable cause
12 exists for the complaint, the director shall attempt to achieve
13 a satisfactory adjustment of the complaint through persuasion
14 and conciliation. The director and staff shall neither
15 disclose what has transpired during the attempted conciliation
16 nor divulge information obtained during any hearing before the
17 commission or a commissioner prior to final action relating to
18 the complaint. An officer or employee of the labor department
19 who makes public in any manner whatsoever any information in
20 violation of this subsection is guilty of a misdemeanor and
21 upon conviction shall be fined not more than one thousand
22 dollars (\$1,000) or imprisoned not more than one year.

23 D. A person who has filed a complaint with the
24 division may request and shall receive an order of
25 nondetermination from the director one hundred eighty days

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1 after the division's receipt of the complaint. The order of
2 nondetermination may be appealed pursuant to the provisions of
3 Section 39-3-1.1 NMSA 1978.

4 E. If conciliation fails or if, in the opinion of
5 the director, informal conference cannot result in conciliation
6 and the complainant has not requested a waiver of right to
7 hearing pursuant to the provisions of Subsection H of this
8 section, the commission shall issue a written complaint in its
9 own name against the respondent. The complaint shall set forth
10 the alleged retaliatory action, the secretary's rule or the
11 section of the Whistleblower Protection Act alleged to have
12 been violated and the relief requested. The complaint shall
13 require the respondent to answer the allegations of the
14 complaint at a hearing before the commission or hearing officer
15 and shall specify the date, time and place of the hearing. The
16 hearing date shall not be more than fifteen or less than ten
17 days after service of the complaint. The hearing shall be held
18 in the county where the respondent is doing business or the
19 alleged retaliatory action occurred.

20 F. Within one year of the filing of a complaint by
21 a person aggrieved, the commission or the director shall:

22 (1) dismiss the complaint for lack of probable
23 cause;

24 (2) achieve satisfactory adjustment of the
25 complaint as evidenced by order of the commission; or

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1 (3) file a formal complaint on behalf of the
2 commission.

3 G. Upon the commission's petition, the district
4 court of the county where the respondent is doing business or
5 the alleged retaliatory action occurred may grant injunctive
6 relief pending hearing by the commission or pending judicial
7 review of an order of the commission so as to preserve the
8 status quo or to ensure that the commission's order as issued
9 will be effective. The commission shall not be required to
10 post a bond.

11 H. The complainant may seek a trial de novo in the
12 district court in lieu of a hearing before the commission;
13 provided that the complainant requests from the director, in
14 writing, a waiver of the complainant's right to hearing within
15 sixty days of service of written notice of a probable cause
16 determination by the director. The director shall approve the
17 waiver request and shall serve notice of the waiver upon the
18 complainant and respondent. The complainant may request a
19 trial de novo pursuant to Section 39-3-1 NMSA 1978 within
20 thirty days from the date of service of the waiver. Issuance
21 of the notice shall be deemed a final order of the commission.

22 I. If a complainant prevails in an action or
23 proceeding brought pursuant to this section, the court may
24 award actual damages, punitive damages and reasonable attorney
25 fees, and the state shall be liable the same as a private

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1 person.

2 Section 7. HEARING PROCEDURES. --

3 A. The respondent to a complaint made pursuant to
4 Section 6 of the Whistleblower Protection Act may file a
5 written answer to the complaint, appear at the hearing, give
6 testimony and be represented by counsel and may obtain from the
7 commission subpoenas for any person or for the production of
8 any evidence pertinent to the proceeding. The complainant
9 shall be present at the hearing and may be represented by
10 counsel. Each party shall have the right to amend his
11 complaint or answer.

12 B. A panel of three members of the commission
13 designated by the chairman shall sit, and a decision agreed
14 upon by two members of the panel shall be the decision of the
15 commission. However, a commissioner who has filed a complaint
16 shall not sit on the panel hearing his complaint. Hearings
17 also may be conducted by a hearing officer employed by the
18 division or, if the hearing officer is unavailable, one member
19 of the commission may be designated by the chairman to act as a
20 hearing officer. A hearing officer shall have the same powers
21 and duties as the commission as set forth in Paragraph (2) of
22 Subsection A of Section 28-1-4 NMSA 1978.

23 C. The complainant or his representative shall
24 present to the commission or the hearing officer the case
25 supporting the complaint. Evidence concerning prior attempts

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1 at conciliation shall not be received. The director shall not
2 participate in the hearing, except as a witness.

3 D. The commission and the hearing officer shall not
4 be bound by the formal rules of evidence governing courts of
5 law or equity but shall permit reasonable direct examination
6 and cross-examination and the submission of briefs. Testimony
7 at the hearing shall be taken under oath and recorded by tape
8 or otherwise. Upon the request of any party, testimony shall
9 be transcribed; provided that all costs of transcribing shall
10 be paid by the party so requesting. Each commissioner and
11 hearing officer may administer oaths.

12 E. Upon the conclusion of a hearing conducted by a
13 hearing officer, the hearing officer shall prepare a written
14 report setting forth proposed findings of fact and conclusions
15 of law and recommending the action to be taken by the
16 commission. The hearing officer shall submit the report to a
17 review panel consisting of no more than three members of the
18 commission designated by the chairman. A commissioner shall
19 not sit on the panel reviewing the hearing officer's report
20 issued in connection with a complaint filed by that
21 commissioner. A decision by a majority of the members of the
22 review panel shall be the decision of the commission. If the
23 commission finds from the evidence presented at any hearing
24 held pursuant to this section that the respondent has engaged
25 in a retaliatory action, it shall make written findings of

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1 fact, conclusions of law and its decision based upon the
2 findings of fact and conclusions of law. The commission may
3 adopt, modify or reject the proposed findings of fact and
4 conclusions of law and the action recommended by the hearing
5 officer. Within five days after any order is rendered by the
6 commission following a hearing, the commission shall serve upon
7 each party of record and his attorney, if any, a written copy
8 of the order by certified mail to the party's address of
9 record. All parties shall be deemed to have been notified on
10 the tenth day following the mailing. As part of its order, the
11 commission may require the respondent to pay actual damages to
12 the complainant and to pay reasonable attorney fees, if the
13 complainant was represented by private counsel, and to take
14 such affirmative action as the commission considers necessary,
15 including a requirement for reports of the manner of
16 compliance.

17 F. If the commission finds from the evidence that
18 the respondent has not engaged in a retaliatory action, it
19 shall make written findings of fact and serve the complainant
20 and respondent with a copy of the findings of fact and with an
21 order dismissing the complaint.

22 Section 8. ENFORCEMENT.--If a respondent to a complaint
23 filed pursuant to the Whistleblower Protection Act does not
24 comply with an order of the commission, the attorney general or
25 district attorney, at the request of the secretary, shall

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1 secure enforcement of the commission's order by a district
2 court. The proceeding shall be initiated by the filing of a
3 petition in the district court of the county where the
4 respondent is doing business or the alleged retaliatory action
5 occurred. A copy of the petition shall be served on the
6 respondent personally or by certified mail, return receipt
7 requested. The court may make and enter upon the proceedings
8 an order to decree enforcement of the order of the commission.

9 Section 9. APPEAL. --A party may appeal the final decision
10 of the commission pursuant to the provisions of Section 39-3-1
11 NMSA 1978.

12 Section 10. POSTING OF LAW AND INFORMATION. --Every
13 employer subject to the Whistleblower Protection Act shall keep
14 posted in a conspicuous place on his premises notices prepared
15 by the division that set forth excerpts of that act and other
16 relevant information as determined by the secretary.